

ORIGINAL

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20534

DISPATCHED BY
PR Docket No. 92-210

In the Matter of

Amendment of Part 90
of the Commission's Rules
Governing Extended
Implementation Periods

RM-7974

REPORT AND ORDER

Adopted: May 13, 1993;

Released: June 9, 1993

By the Commission:

I. INTRODUCTION

1. On October 13, 1992, we released a *Notice of Proposed Rule Making (Notice)* in PR Docket No. 92-210, 7 FCC Rcd 6587 (1992), proposing to amend our slow-growth construction requirements for private land mobile radio licensees. In this *Report and Order*, we amend 47 C.F.R. § 90.629 to lengthen the maximum extended implementation period from three to five years; to eliminate the fleet-size requirement for qualification for extended implementation; to eliminate the annual reporting requirement; to permit all applicants that might be required by law to follow a multi-year cycle for planning, approval, funding and purchasing a proposed system to be eligible for extended implementation; and to extend the applicability of 47 C.F.R. § 90.629 to Specialized Mobile Radio (SMR) Category applicants.

II. BACKGROUND

2. In the private land mobile radio services, licensees are ordinarily required to have conventional systems constructed and placed in operation within eight months of licensing, and trunked systems constructed and placed in operation within one year of licensing, or their licenses

will cancel automatically.¹ Pursuant to Section 90.629, however, applicants for frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Category pools may, upon the proper showing, be given an extended period of time for constructing and placing a station in operation.

3. Section 90.629 allows a three-year implementation period for applicants able to make one or more of the following showings: (1) the proposed system will serve a large fleet of at least 200 mobile units and will involve a multi-year cycle for planning, approval, funding, purchase and construction; (2) the proposed system will require longer than eight months to place into operation because of its purpose, size, or complexity; (3) the proposed system is to be a part of a coordinated or integrated area-wide system that will require more than a year to plan, approve, fund, and construct; or (4) the applicant is a local governmental agency and demonstrates that it is required by law to follow a multi-year cycle for the planning, approval, funding and purchasing of the proposed system.²

4. The *Notice* solicited comment on a proposal to amend Section 90.629 of our Rules, 47 C.F.R. § 90.629, by (1) extending the rule's applicability to Specialized Mobile Radio (SMR) Category applicants, (2) lengthening the "slow growth" period from three to five years, (3) eliminating the fleet-size requirement for qualification for an extended implementation period, and (4) eliminating the requirement that licensees provide us with an annual report on the status of their system implementation. Eleven commenters filed comments in this proceeding; four filed reply comments.³

III. DISCUSSION

5. In the *Notice*, we observed that an increasing number of SMR applicants have expressed interest in operating technically innovative, wide-area systems.⁴ We noted that because of the expense and complexity of these systems, licensees are frequently not able to construct and place them in operation within the one-year time frame applicable to trunked SMRs.⁵ To fully implement their systems, SMR applicants are therefore often in need of an extended implementation period. We continue to believe that applicants for SMR Category channels have as great a need for extended implementation authority as applicants for frequencies in the categories currently identified in Section 90.629. We therefore will include applicants for SMR Category channels among those that are eligible for extended implementation authority.⁶

¹ See 47 C.F.R. § 90.633(c), 47 C.F.R. §§ 90.631(e) and (f), 47 C.F.R. § 90.633(d) (conventional); 47 C.F.R. §§ 90.631(e) and (f) (trunked).

² 47 C.F.R. § 90.629(a)(1)-(4).

³ Comments were filed by American Mobile Telecommunications Association (AMTA); Associated Public-Safety Communications Officers, Inc. (APCO); Council of Independent Communication Suppliers (CICS); Delmarva Power Co. (Delmarva); EDS Corporation (EDS), a subsidiary of General Motors Corporation and General Motors Research Corporation; Fleet Call, Inc. (Fleet Call); National Association of Business and Education Radio, Inc. (NABER); PowerSpectrum, Inc. (PSI), a subsidiary of Geotek Industries, Inc.; Southern California Gas Company (SCG); Texas Utilities Electric Company (TU Electric); Utilities Telecommunications Council (UTC). Reply

comments were filed by Ameritech Operating Companies (Ameritech); Consumers Power Company (Consumers) EDS, and NABER.

⁴ See *Fleet Call, Inc.*, 6 FCC Rcd 1533 (1991); *American Mobile Data Communications, Inc.*, 4 FCC Rcd 3802 (1989).

⁵ E.g., *Fleet Call* *supra* at 1536.

⁶ There are three petitions currently before us seeking modification of our rules that govern the licensing of SMR systems. See RM-8029, (asking the Commission to facilitate licensing of wide-area systems), filed March 13, 1992 by the National Association of Business and Education Radio, Inc.; RM-8030 (asking the Commission to modify the so-called "40-mile rule," 47 C.F.R. § 90.627(b)), filed May 26, 1992 by A&B Electronics, Inc.; and RM-8117 (proposing a wide-area SMR licensing program), filed October 26, 1992 by the American Mobile Telecommunica-

6. We will also lengthen the maximum extended implementation construction period from three to five years.⁷ It is evident, based on the record in this proceeding, that many types of private land mobile radio applicants are required to develop and implement radio systems over extended periods of time. It has always been our practice to cooperate with these applicants, many of which serve the public welfare and are required by state law to follow multi-year planning and funding cycles, to assure that they have the frequencies and time available to implement their radio systems. There is, however, competition for available spectrum. Therefore, the extended implementation period should not be so long that frequencies remain warehoused or unused. We believe that a maximum five-year implementation period, coupled with reasonable construction benchmarks, is sufficient to enable licensees to plan and construct their systems and, at the same time, to ensure that scarce spectrum is used.

7. We see no continuing need, however, to require that the applicant serve at least 200 mobile units.⁸ There is little correlation between the number of mobile units operating on an applicant's system and that applicant's need for extended implementation. None of the commenters who addressed this issue opposed eliminating the 200-mobile fleet size requirement.⁹ Accordingly, we are modifying Section 90.629 to eliminate the requirement that slow-growth applicants serve at least 200 mobile units.

8. Furthermore, our rules currently provide that applicants requesting extended implementation authority because they are required by law to follow a multi-year cycle for the planning, approval, funding and purchasing of a system must be local government agencies in order to qualify for such authority. We believe that the need for extended implementation exists for all agencies and organizations that are subject to these requirements, not merely local government agencies. Therefore, we will permit any entity required by law to follow a multi-year cycle for the planning, approval, funding and purchasing of a system to be eligible for extended implementation.¹⁰

tions Association, Inc. As part of a future rule making proceeding addressing these petitions, we may revisit and possibly modify our decision to extend "slow growth" authority to SMR Category applicants.

⁷ Various commenters supported lengthening the "slow growth" period for applicants from three to five years. See, e.g., CICS comments at ii, 7-8, NABER Reply Comments at ii, EDS Comments at 2, PSI Comments at 5, SCG Comments at 1-2, Ameritech Reply Comments at 2. UTC requested that non-commercial applicants be granted up to ten years to construct and operate a large system. UTC Comments at 5-6. Two commenters, AMTA and APCO, opposed the proposed rule change. AMTA expressed general reservations about such extensions. APCO was concerned that spectrum misuse would result if slow growth authority were extended to non-public safety entities licensed in the Public Safety Pool. AMTA Comments at 7. APCO Comments at 2-4. Consumers' challenged APCO's concerns regarding potential spectrum misuse from allowing non-public safety entities from incorporating Public Safety channels into their slow growth systems because APCO had not made any showing of the misuse it anticipates. Consumers' Reply Comments at 8.

⁸ 7 FCC Rcd at 6587. This action is taken pursuant to a proposal offered by UTC in its petition for rule making (RM-7974).

⁹ CICS Comments at ii, 8-9, EDS Comments at 2-3, PSI

9. The *Notice* further proposed to abolish the current requirement that a licensee granted extended implementation submit annual reports to the Commission showing its progress toward completing its system. Twelve commenters supported abolishing the annual reporting requirement;¹¹ two commenters opposed eliminating the annual reporting process for extended implementation systems.¹² We agree with these latter commenters that it is important for licensees operating pursuant to slow-growth implementation plans to demonstrate compliance with their commitments. We see no need, however, to require slow-growth licensees to file detailed reports showing the extent to which the authorized system has been implemented. These reports generally contain more detail than is necessary to assure compliance with their implementation plans and, ultimately, impose another administrative burden on our already taxed licensing staff. We believe it will be sufficient to require slow-growth licensees to certify annually that they are in compliance with their extended implementation commitments.

10. Accordingly, we are modifying Section 90.629 to require slow-growth applicants to certify annually during their extended implementation period that they are in compliance with their commitments. It is the licensee's obligation to fulfill its commitments and to notify this agency when it expects to deviate from its implementation plans.¹³ Once granted a license pursuant to our slow-growth rules, a licensee must assure that progress is being made in accordance with its representations including, but not limited to, the securing of necessary funding and constructing and placing the system in operation. If a licensee fails to meet its commitments, and has failed to obtain approval for its deviations, we will terminate the licensee's extended implementation authority. The licensee, in such cases, will be given six months to complete construction of its system. At the end of this six-month period, authorizations for all stations not constructed and placed in operation will be cancelled and the frequencies will be made available for reassignment.

Comments at 6 n.6, SCE Comments at 6, TU Electric Comments at 5-6, UTC Comments at 7-8, Ameritech Reply Comments at 2, NABER Comments at 7.

¹⁰ This action, too, is in response to a proposal put forth by UTC in its petition for rule making. It will enable -- in addition to local governmental entities -- licensees, such as utilities, to be eligible for extended implementation.

¹¹ PSI Comments at 5, UTC Comments at 8, Ameritech Reply Comments at 2, SCG Comments at 2, SCE Comments at 6, SCE Reply Comments at 2, Delmarva Comments at 6, EMS Comments at 3, CICS Comments at 12, NABER Reply Comments at 10-11.

¹² APCO opposes elimination of the annual reporting process for slow growth licensees, arguing that this is the only method for determining whether a licensee has a legitimate need for extended implementation or is warehousing frequencies. APCO Comments at 5. In a similar vein, AMTA questions how the Commission will monitor and enforce construction benchmarks without annual reporting requirements. AMTA Comments at 7-8. These concerns are addressed in paragraph 10, *infra*.

¹³ Licensees may, of course, amend their initial commitments. Such amendments should be filed when it becomes apparent that funding is not forthcoming as planned or when other factors are preventing implementation as initially proposed. In any event, requests to amend implementation plans should be filed annually with the licensee's certification statement.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
 Donna R. Searcy
 Secretary

APPENDIX

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 90 - Private land mobile radio services

1. The authority citation to Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332 unless otherwise noted.

2. Section 90.629 is revised to read as follows:

§ 90.629 Extended implementation period.

Applicants requesting frequencies for either trunked or conventional operations may be authorized a period of up to five (5) years for constructing and placing a system in operation in accordance with the following:

(a) The applicant must justify an extended implementation period. The justification must describe the proposed system, state the amount of time necessary to construct and place the system in operation, identify the number of base stations to be constructed and placed in operation during each year of the extended construction period, and show that:

(1) The proposed system will require longer than eight months (if a conventional system) or one year (if a trunked system) to construct and place in operation because of its purpose, size, or complexity; or

(2) The proposed system is to be part of a coordinated or integrated wide-area system which will require more than eight months (if a conventional system) or one year (if a trunked system) to plan, approve, fund, purchase, construct, and place in operation; or

(3) The applicant is required by law to follow a multi-year cycle for planning, approval, funding, and purchasing the proposed system.

(b) Where an applicant is required by law to follow a multi-year cycle for planning, approval, funding and purchasing a proposed system, the applicant must indicate whether funding approval has been obtained and if not, when such funding approval is expected.

(c) Authorizations under this Section are conditioned upon the licensee constructing and placing its system in operation within the authorized implementation period and in accordance with an approved implementation plan of up to five years. Licensees must certify annually that they are in compliance with their yearly station construction commitments, but may request amendment to these commitments at the time they file their annual certification. If the Commission approves the requested amendments to a licensee's implementation commitments, the licensee's extended implementation authority will remain

in effect. If, however, the Commission concludes, at this or any other time, that a licensee has failed to meet its commitments, the Commission will terminate authority for the extended implementation period. When the Commission terminates an extended implementation authority, the affected licensee will be given six months from the date of termination to complete system construction. At the end of any licensee's extended implementation period, authorizations for all stations not constructed and placed in operation will be cancelled. Trunked systems granted an extended implementation period must comply with the channel loading requirements of Section 90.631(b). Conventional channels not loaded to 70 mobile units may be subject to shared use by the addition of other licensees.

(d) Applicants eligible in the Industrial/Land Transportation Category requesting authorizations under this section may request frequencies in the Business Category only if the application contains a statement that no frequencies in the Industrial/Land Transportation Category are available for assignment in their geographic area.

3. Section 90.631 is amended by revising paragraph (b) to read as follows:

§ 90.631 Trunked systems loading, construction and authorization requirements.

* * * * *

(b) Each applicant for a trunked system shall certify that a minimum of 70 mobiles for each channel authorized will be placed in operation within five years of the initial license grant. Except as provided in paragraph (i) of this section, if at the end of five years a trunked system is not loaded to the prescribed levels and all channels in the licensee's category are assigned in the system's geographic area, authorization for trunked channels not loaded to 70 mobile stations cancels automatically at a rate that allows the licensee to retain one channel for every 100 mobiles loaded, plus one additional channel. If a trunked system has channels from more than one category, General Category channels are the first channels considered to cancel automatically. All licensees who are authorized initially before June 1, 1993, and are within their original license term or are within the term of a two-year authorization granted in accordance with paragraph (i) of this section are subject to this condition. A licensee that has authorized channels cancelled due to failure to meet the above loading requirements will not be authorized to obtain additional channels to expand that same system for a period of six months from the date of cancellation.

* * * * *

11. To obtain an extended implementation period, an applicant currently must file a statement justifying the amount of time needed to construct and place its radio system in operation.¹⁴ We shall continue this requirement. An applicant requesting extended implementation authority should include in its supporting statement: (1) a description of the proposed system; (2) the amount of time necessary to construct and place the system in operation; (3) identification of the number of base stations to be constructed and placed in operation during each year of the extended construction period; (4) a showing that the applicant satisfies at least one of the three conditions for qualification for extended implementation as set forth in Section 90.629(a)(1), (2) and (3); and, (5) whether the applicant has obtained funding approval for constructing the proposed system and if not, when such funding approval is expected to be obtained, if the applicant is required by law to follow a multi-year planning and funding cycle.

12. Based on each applicant's statement of justification, we will determine whether slow-growth authority should be granted and, if so, what the licensee's implementation period should be. Our slow-growth rules, however, are not intended to be used as a mechanism to warehouse spectrum. We intend, therefore, to scrutinize all slow-growth requests closely, especially those filed by applicants who have yet to obtain necessary funding to construct their systems or who are applying for SMR Category channels. Our purpose is to ensure that such applicants have demonstrated a need for extended implementation and that the channels will be placed in operation within a reasonable period of time.

13. Our construction rules are the only mechanism that we currently have to assure that spectrum is placed in operation within the prescribed periods of time by those granted licenses. Spectrum for the private land mobile radio services is scarce, and we do not intend to allow channels to remain encumbered under the protection of our slow-growth rules. We expect all applicants that apply under slow-growth rules to be diligent in providing justification for extended implementation and reasonable benchmarks for constructing and placing their systems in operation. We will expect SMR applicants to be especially diligent in providing this information. To further ensure that SMR Category spectrum is properly put to use, we will reserve the right, at any time prior to the expiration of the extended implementation period, to request information from the SMR Category licensee regarding the licensee's progress toward completing its system.

14. Additionally, we will apply the Finder's Preference Program¹⁵ to licensees authorized under extended implementation to the same extent as to other authorizations,¹⁶ i.e., by permitting "finders" to identify and acquire chan-

nels not constructed and placed in operation only at the end of the extended implementation period and after the Commission has followed its normal channel recovery procedures.¹⁷

15. Finally, the *Notice* proposed to clarify Section 90.629(b) to indicate that licensees of trunked systems authorized an extended implementation period are required to load their systems to the same level (70 mobiles per channel within 5 years of authorization) as those licensees of trunked systems not authorized an extended implementation period. (See Section 90.631(b)). We clarify Sections 90.629 and 90.631(b) accordingly.

IV. CONCLUSION

16. By this action, we modify our rules relating to extended implementation to expand licensee eligibility for extended implementation, increases the maximum allowable time period for extended implementation, and eliminates unnecessary filing burdens on licensees.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

17. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because the adopted rule amendments will not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. No comments were received addressing this certification in the Initial Regulatory Flexibility Analysis contained in the Notice of Proposed Rule Making in this proceeding.

VI. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 332(a), Sections 90.629 and 90.631 of the Commission's Rules, 47 C.F.R. §§ 90.629 and 90.631, ARE AMENDED as set forth in the Appendix below, effective [sixty days after publication in the Federal Register].

19. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

20. For further information concerning this *Report and Order*, contact Tatsu Kondo, Land Mobile and Microwave Division, Private Radio Bureau, (202) 632-7125.

¹⁴ 47 C.F.R. § 90.629(a).

¹⁵ 47 C.F.R. §§ 90.173(k), 90.175(f)(15), 90.611(d), and 90.631(f).

¹⁶ Several commenters requested clarification about the applicability of the Finder's Preference Program to extended implementation authorizations. See NABER Comments at 8-10, Consumers' Reply Comments at 4-5.

¹⁷ As indicated in paragraph 62 of the *Report and Order* that established the Finder's Preference Program, 6 FCC Rcd 7297, 7307 (1991), a finder may not file a preference request for the channels of a licensee that has failed to construct and place its system in operation until 180 days after the deadline has passed for that licensee to construct and place its station in operation.

During this 180-day time period, we conduct our review of the licensee's compliance with our construction requirements and cancel the licensee's station authorization if a violation is uncovered. Individuals wishing to file a finder's preference request with regard to the channels of a licensee granted extended implementation, therefore, may file such request no sooner than 1) 180 days after the original extended implementation period has expired or 2) 180 days after expiration of the six-month "grace" period for constructing and placing a system in operation granted to the licensee whose extended implementation period was prematurely terminated by the Commission (see para 10, *supra*).